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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 486

NATIONAL LABOR RELATIONS BOARD
Petitioner

vs.

TRUITT MANUFACTURING COMPANY
Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinion Of The Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 224 F2d 869.

Jurisdiction Of This Court

The judgment which the Petitioner seeks to have this Court review was rendered by the United States Court of Appeals for the Fourth Circuit on July 30, 1955 and

was on that date entered upon the records of that Court. The Court of Appeals had jurisdiction to render such judgment by virtue of the provisions of the National Labor Relations Act, Section 10 (e), 29 U. S. C. A. 160 (e).

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the procedure of certiorari, is invoked by the Petitioner under the provisions of 28 U. S. C. A. 1254 and the National Labor Relations Act, Section 10 (e), 29 U. S. C. A. 160 (e).

Question Presented

In negotiation upon a demand for a wage increase, if an employer otherwise and in every other respect bargains in good faith, is it, *as a matter of law*, bad faith for the employer to refuse to furnish the employee representative with "full and complete information" as to the employer's "financial status," "dividends" and "manufacturing costs?"

Statutory Provisions Involved

The provisions of statute here pertinent are—

National Labor Relations Act, Section 8 (a) (5), 61 Stat. 140, 29 U. S. C. A. 158 (a) (5):

> "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . "

And

National Labor Relations Act, Section 8 (d), 61 Stat. 140, 29 U. S. C. A. 158 (d):

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

Statement Of The Case

In 1951, 1952 and 1953 the Respondent negotiated and entered into three successive contracts with the International Association of Bridge, Structural and Ornamental Ironworkers of America, AFL, as representative of Respondent's employees.[1] In the Summer of 1953, although a contract was in effect, the Union, under a clause permitting "reopening" on wage matters only, made demand for a 10c an hour wage increase (Petition p. 2). Representatives of the Company and of the Union met

[1]Unless otherwise indicated all page references are to the appendix to the Respondent's brief filed in the Court below. References to portions of the record printed in the appendix to the Board's brief in the Court below are designated "B. A." Any references to portions of the written transcript not printed in either appendix in the Court below are designated "Tr."

and negotiated with respect to this matter. The Company offered a 2½c an hour increase (Petition p. 2). The Union insisted upon 10c and called the employees out on a strike (Petition p. 3).

After the strike ended, the Union renewed its demand for a 10c an hour increase (Petition p. 3). The Company again refused but proceeded to put into effect the 2½c raise which it had been offering (Petition p. 3).

On September 2 the Union, by letter and for the first time, requested "permission to have a certified public accountant examine (the Company's) books, records, financial data, etc. to ascertain or substantiate the Company's position" (B. A. 2). The Company wrote in reply, reviewing the considerations which had impelled it to refuse the 10c wage increase, and declining to grant the Union access to its "confidential financial information," saying at the same time, however, "we will be glad at any time to show you our books and records regarding the wages we pay to our employees whom you represent, although we think you have this information already." (B. A. 3-4).

Thereupon the Union again wrote the Company, requesting "full and complete information with respect to (the Company's) financial standing and profits during the past few years" and "full and complete information and evidence of (the Company's) financial status to substantiate its claim, including bona fide evidence as to dividends paid by the Company during the past ten years

and the breakdown of its manufacturing costs" (B. A. 5-6). To this the Company replied "our refusal to grant your demanded wage increase was based primarily on what such a raise would do to our competitive position in the industry in this area. The Truitt Company is willing to discuss with you at any time the problem of how our wages compare with those of our competition." The Company again declined to furnish the Union with information as to its "financial status" (B. A. 7).

The Board ruled that such refusal on the part of the Respondent was *per se* and in and of itself a violation of law regardless of whether the Respondent was otherwise bargaining in complete good faith. The Board has never made any contention that there is any fault to be found anywhere in the Respondent's attitude or conduct, save in this one respect (R). Indeed, after the exchange of correspondence outlined above, the parties resumed their bargaining meetings (Tr. 20-23) and later arrived at a settlement of their wage dispute.

With respect to the Respondent's refusal to grant a 10¢ an hour wage increase, it is agreed on all sides that such refusal was based on "economic" considerations. And as the Respondent understands, the Board and the Respondent are in agreement that the ruling on the controversy here at issue should be the same whether the Respondent took the position that because of economic considerations it was *unable* to grant the requested increase, or whether the Respondent took the position that

because of economic considerations it was *unwilling* to grant the requested increase. In either event, the Respondent grounded its position on economic considerations. Nor indeed would it seem that negotiations with respect to wages would ordinarily revolve around anything other than economic considerations.

The economic matter which the Company principally discussed during the negotiations was its fear of getting its wages out of line with those of its competitors. It is undisputed that the Company stated that it was "already paying more than (its) competitors in the area" and that it named several such competitors (2).

The Union's representatives who conducted the negotiations on behalf of the Union, and who were the Board's witnesses at the hearing before the Board's Trial Examiner, testified that "the Company stood firm on its position that (it) was already paying more than (its competitors)" (4); that the Company made "explanation there that if they gave more, then it would put them in a position where they would not be able to get jobs" (4-5) and "would price (the Company) out of competitive bidding" (9, 14); that the Company "gave (the Union) exact names and figures and prices of jobs that (it) had lost because (it) had been underbid" (5, 10); and that the Union never asked for any further substantiation of the Company's contention that "it was already paying more than

its competitors" (4). Similarily, the Company's Vice-President testified (16-17):

> "Q. And what evidence did you offer to show the Union?
>
> A. We had statements from various firms, Peden Steel, Davie Steel, Carolina Steel . . . We had typewritten lists of the wage rates that each was paying and general rough classifications . . . We had evidence to show that we were paying actually higher rates than all but one of these, the one being Carolina Steel, with which we were right on par; and I might add, needless to say, they are our chief competition."

Argument

The situation is one in which the Company, having basically demonstrated its good faith in dealing with the Union, having repeatedly entered into contracts with the Union, and being on the occasion in question engaged in bargaining with respect to a wage increase, (1) offered all its wage records to the Union, (2) offered and gave a part of the requested wage increase, (3) stated that out of economic considerations it would not agree to any further increase, (4) explained that outstanding among such economic considerations was its belief that it was already paying as much or more than its competitors and that if it went further beyond them, it would price itself out of its market, and (5) furnished statistical data and details to corroborate its position that its wages were already as high

In this case the Board does not question that the Respondent had such mind and purpose and made bona fide effort to reach agreement. The Board simply contends that the single fact of Respondent's refusal to furnish its financial records to the Union *negatives all good faith otherwise established and in and of itself convicts* the Respondent of bad faith and failure to bargain.

It has never been the law, however, that adherence to a position taken on any given matter or a particular refusal or insistence constitutes in and of itself bad faith. If this were not sufficiently clear from the basic principle stated above, it is certainly made so by the express and positive provision of the Act that good faith bargaining involves no obligation "to agree to a proposal" or make "a concession."[2] Nevertheless the Board seeks to have this Court rule, directly in the teeth of this provision, that there was, *as a matter of law, an absolute duty* on the part of the Respondent "to agree to a proposal" and make "a concession," namely the drastic proposal and the vital concession of delivering its financial records to the Union.

Congress has in effect said: We require only that the employer and employee representative shall in good faith bargain with each other. By this we do not intend that either shall ever be compelled "to agree to a proposal" or make "a concession."

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[2]National Labor Relations Act, Section 8 (d), 61 Stat. 140, 29 U. S. C. A. 158 (d).

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or higher than its competitors and that it was being underbid by them—and refused only to give the Union "full and complete information" as to its "financial status," "dividends" and "manufacturing costs."

Upon this undisputed state of facts the Board asks the Court below to rule that the information which the Respondent withheld was *absolutely and as a matter of law* essential to good faith bargaining—and that by the Respondent's refusal to furnish such information, the good faith bargaining, which the Respondent was otherwise admittedly engaged in, became necessarily transformed into bad faith bargaining.

The Court below having refused to make such ruling, the Board now seeks to have this Court do so.

Before analyzing the extraordinary implications of the ruling which the Board seeks in this case, the Respondent would call attention to the basic standard which governs the determination of good faith bargaining. The controlling principle has always been that employer and employee representative shall "enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement touching wages, hours and conditions of employment." *Globe Cotton Mills vs. National Labor Relations Board,* 103 F2d 91, 94 (C. A. 5).

The test of failure to bargain is whether in the light of all the facts and circumstances established by the evidence, it is to be seen that such "open and fair mind" and "sincere purpose" to reach agreement have been lacking.

Yet the Board now desires this Court to say: Even though the Respondent has otherwise bargained in complete good faith, nevertheless by refusing to agree to the proposal and make the concession of furnishing its financial records to the Union, automatically the Respondent violated the Congressional enactment.

It is submitted, on the other hand, that the ruling which the Board seeks would violate the positively expressed will of Congress and instead of implementing, would explicitly disobey what Congress has written.

This has been heretofore clearly recognized by this Court. In a case where, as here, the Board contended that the taking of a certain position in bargaining was, *per se*, and as a matter of law, violative of the Statute, this Court said:

> "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8 (d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession."

> "Accordingly, we reject the Board's holding that bargaining for the management functions clause pro-

posed by Respondent was, *per se*, an unfair labor practice."

National Labor Relations Board vs. American National Insurance Company, 343 U. S. 395, 96 L. Ed. 1027, 73 S. Ct. 824.

Turning now to an analysis of the meaning and implication of what the Board seeks, it is to be seen that there is apparently no limit to the financial information which a Union could require of an employer under the Board's contentions. The complaint in this case alleges that the Respondent violated the Act in that it failed to furnish to the Union its "books, records, statistics, manufacturing costs, dividend records, financial data and other information." As has been hereinabove noted, the Union's written demand upon the Company was that the Union be furnished or given access to "full and complete information with respect to (the Company's) financial standing and profits," including "evidence as to dividends paid by the Company during the past ten years and the breakdown of its manufacturing costs" (B. A. 5-6).

At the hearing before the Board's Trial Examiner, upon the Board's chief witness being questioned on this issue, he testified (50):

" . . . If it took the complete records, profits, dividends, manufacturing costs, or what have you, anything, relating to the Company's inability to grant

more money, then I think it should have been made available to (the Union's) Accountant that was to examine the books."

Similarly, the Board contends that the Respondent "was required to grant the Union's request for 'full and complete information and evidence of (the Company's) financial status' " (Board's brief in the Court below, p 11). The Board further declared that the Union was entitled to an examination of the Company's "profit, costs and other financial data" (Board's brief in the Court below, p. 13), and to a "financial report as to (the Company's) 'profit in regard to sales and costs,' its capitalization, and its cost and price structure upon which its competitive bidding was computed" (Board's brief in the Court below, p. 11).

In the light of all these specifications in the complaint, in the Union's demand upon the Respondent, in the testimony of the Board's witnesses and in the Board's brief in the Court below, no other conclusion is possible than that the ruling of the Board has no identifiable limits and that the general words of the Board's order "statistical and other information" encompass "full and complete information and evidence" derived from the Company's "complete records" as to its "financial standing," "its capitalization," its "sales," "its costs," its "manufacturing costs," "its cost and price structure," its "profits" and its "dividends."

The Respondent submits that if it should now be held that a wage demand creates an automatic legal right to all

such information as this, no matter in what good faith an employer otherwise bargains and acts, it would indeed be with general consternation that employers the country over would learn that such is the law. It has not heretofore been supposed that upon an employer refusing a wage increase to employees, he must disclose how much money he has in the bank, and what and where are all his assets and his liabilities, his revenues and expenditures, his profits and his losses.

Nor is the matter simply one of interest in privacy as a matter of principle. For example, to thousands of companies in keen competition throughout the land the privacy of manufacturing cost data is a highly valuable and guarded asset. Compulsorily to remove such privacy is to destroy this asset. If it were the law that such could be accomplished merely by the making of a wage demand, as the Board now contends, many wage demands would be made for no other purpose whatever than to obtain all the information which the Board says must then be disclosed.

Likewise, in the case of genuine wage demands, information such as is here at issue would often be requested with no purpose in mind save that of pressure upon the employer, that is, that the employer might grant the wage demand rather than make public its confidential financial data. As Chief Judge Parker in the opinion of the Court below says, "demand for examination of books could be used as a club to force employers to agree to an unjustified

wage rate rather than disclose their financial condition with such confidential matters as manufacturing costs" (Petition p. 24).

It is submitted that the Board's *fiat* in this case was indeed a giant stride toward the economic transformation of the Nation and that the Court below was right in refusing to place its seal of approval upon such a decree.

The Board in its Petition (p. 10) points out that "wage demands constitute one of the most frequent issues that arise in bargaining." And, says the Board (Petition p. 11), when the employer is confronted with a wage demand, he "shuts off further bargaining" unless he furnishes the Union with such information as is here in question. A conclusive answer to this assertion is to be found in the plain fact that for some twenty years there has been very effective bargaining under the Act with respect to wage demands, resulting in thousands upon thousands of agreements and contracts, without employers having been legally required to furnish the sort of information which is here under consideration.

Upon further analysis of the Board's ruling, it is to be seen that in still further respects it is untenable. The Board's order directs the Respondent to furnish such information "as will substantiate the Respondent's position" (B. A. 65).

Immediately the questions arise: What is meant by "substantiate," and to whose satisfaction must the Re-

spondent's "position" be substantiated, and what is the consequence if the information furnished fails to "substantiate?"

The Respondent's "position" was that it would agree to a 2½c an hour wage increase but would not agree to a 10c an hour increase. To "substantiate" this position must the Respondent *prove* that it *ought* not to be required to increase wages more than 2½c per hour? Certainly the Respondent is not to be required to prove this to the satisfaction of the Union. The only alternative then would be that the Respondent must so "prove" to the satisfaction of the Board and the Courts. But until now it has never been contemplated that the National Labor Relations Act empowers either Board or Courts to sit in judgment on any issue as to whether an employer should grant a certain wage increase or any wage increase.

The nearest the Board comes to grappling with this dilemma is to declare that the Respondent must furnish data which will show whether its position was "reached in good faith" (Board's brief in the Court below, p. 13). Such statement, however, contributes neither solution nor clarification to the matter. Let us assume that "full and complete information" from the Respondent's books and records would show that the Respondent had large cash funds lying idle in the banks. Could the Board and the Courts thereupon adjudge that the Respondent was in bad faith in refusing to agree to a 10c an hour wage in-

crease? Any such adjudication would obviously be forbidden by the explicit statutory provision that no one may be held to be in bad faith, or to have failed to bargain in good faith, because of his refusing to agree to a proposal or make a concession—to say nothing of the general proposition that the Respondent would be entitled to its own opinion, and to adhere to its own opinion, as to what funds would or would not be needed in the operation of its business.

Even if it were within the province of the Board or the Courts to adjudge that the Respondent's information proved that its position of refusing the 10c increase had not been "reached in good faith," still such a determination would lead nowhere. Neither the Board nor the Courts could thereupon order the Respondent to change its position and grant the requested increase. Nor would a directive that the Respondent proceed to bargain again, and this time "in good faith," have any legal import whatever. For under the Act the Respondent could never be required, nor properly ordered by the Board or the Courts, to abandon its position in the matter and grant a 10c wage increase or any increase beyond what it had offered.

From all of which it is abundantly clear that with this case the Board is inviting the Court to follow it into a legalistic quagmire in which no logical footing is to be found anywhere. It is submitted that the Court below

rightly declined to accompany the Board on any such expedition.

The Board does not contend that any Court has made such a ruling as it seeks from this Court, save only the Court of Appeals for the Second Circuit in the case of *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F2d 680. Upon study of the *Jacobs* case, however, it will be seen that the question here at issue was only incidentally dealt with in that case. Language in the *Jacobs* case which the Board now relies on would seem to have been *obiter dictum*, the Court in that case having upheld the Board's finding that the Respondent there had failed to bargain essentially in that such Respondent "took the position that discussion of wage increases would be futile" and "refused to discuss the other subjects at all" or to attend "further" bargaining meetings. *National Labor Relations Board vs. Jacobs Manufacturing Company*, 196 F2d 680, 683 (C. A. 2).

Indeed the petition before this Court concedes (Petition p. 8) that the employer in the Jacobs case "had refused to discuss pension plans with the Union" and that thereby completely sufficient grounds for a Court decree supporting a finding of violation of "Section 8 (a) (5) of the Act" had been established, apart from any issue of refusal to furnish information.

It is submitted that upon a factual situation such as exists here no Court has ruled as the Petitioner now seeks

to have this Court rule. It is respectfully submitted that the able Court below was right in refusing to make such a ruling upon the facts of the present case and that its considered judgment in the matter should not be disturbed.

Conclusion

Upon the facts hereinabove outlined and for the reasons herein set forth, the Respondent prays that the petition for writ of certiorari be denied.

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